

DEVELOPMENT & COMMERCIAL BANK BHD.

a

v.

ABDULLAH ISMAIL & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

[CODE NO. D2-23-130-88]

28 SEPTEMBER 1988

b

BANKING: *Guarantee - Pending foreclosure action - Whether bank is estopped - Conclusive evidence clause.*

CIVIL PROCEDURE: *Defence - Bound by pleadings - Cannot raise another issue by affidavit.*

c

The two defendants were sued as guarantors of a fixed loan facility granted subject to a charge over a factory and the guarantee.

In their defence the defendants alleged that the notices of demand to them were bad in law and that there has been a variation of the amount guaranteed.

d

However in the joint affidavit opposing the O. 14 application the defendants added another issue, that of estoppel, as there was a pending foreclosure proceeding under the charge.

Judgment to the plaintiff was granted by the Senior Assistant Registrar and the defendants appealed to the Judge.

Held:

e

[1] It is cardinal principle of pleadings that a party is bound by his own pleading.

[2] By raising the issue of estoppel for the 1st time in their affidavit, the defendants are trying to improve their defence which is not permissible.

[3] The plea of estoppel has no merits as the plaintiff's action here is to enforce a different security altogether.

f

[4] The defendants cannot use the pending foreclosure proceedings against the principal debtor as a means of staying the proceedings against them.

[5] The defendants' liability hinges on the express terms and conditions of their guarantee.

[6] The conclusive evidence clause in the guarantee seals the defendant's liability under the same.

g

[7] The defendant's appeal is dismissed.

[Appeal dismissed.]

Cases referred to:

UMBC v. Palm and Vegetable Oil [1982] CLJ (Rep) 358

Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani [1985] CLJ (Rep) 41

Dobbs v. National Bank of Australasia Ltd. [1935] 53 CIR 643

h

For the defendants/appellants - Ismail Sabri bin Yaakob; M/s. Ismail Sabri & Wee

For the plaintiff/respondent - M. Jayaletchumi; M/s. Adnan Sundra & Low

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a

JUDGMENT

Siti Norma Yaakob J:

The two defendants in this action are sued as the guarantors to a fixed loan facility that was granted by the plaintiff to a company called, Abi Properties Sdn. Bhd., of which the two defendants were directors at the material time.

b

Under the plaintiff's letter of offer dated 3 April 1986, the facility was secured by a first legal charge over a factory, the purchase of which was financed by the facility and the personal guarantees of the two defendants to the limit of RM550,800.

c

In their statement of defence, the defendants raised two issues namely that the notices of demand were bad in law and that there has been a variation in the amount guaranteed. However, in a joint affidavit opposing on O. 14 application, the defendants had also added a third issue in that the plaintiff is estopped from proceeding in this action as there are pending foreclosure proceedings instituted by the plaintiff against the principal debtor to realise the facility by the sale of the other security to the loan.

d

It is a cardinal principle of pleadings that the parties to an action are bound by their own pleadings. By raising the issue of estoppel in their affidavit for the first time, the defendants are clearly seeking to improve on their statement of defence and following the decision of *UMBC v. Palm and Vegetable Oil* [1982] CLJ (Rep) 358, this is not permissible, particularly so in this case when this plea alone was relied upon as the defendants chose to abandon the other issues raised in their statement of defence.

e

Apart from the aspect of pleadings, the plea of estoppel merits no consideration as the instant suit against the defendants is to enforce a different security altogether to the one commenced against the principal debtor. The liability or otherwise of the defendants hinges greatly on the express terms and conditions of the guarantee executed by them on 24 May 1986.

f

Clause 12 of the guarantee states that "this guarantee shall be in addition to and not in substitution of any other guarantee for the customer given by any of us to the bank." Further, clause 17 confirms that "the bank shall be under no liability to marshal in our favour any securities or any of the funds or assets which the bank may be entitled to receive or upon which the bank has a claim".

g

The same situation was raised in the case of *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1985] CLJ (Rep) 41, where the Federal Court held that the guarantor has no special right to demand that the creditors call upon the principal debtor to pay off the debt before asking the guarantor to pay. Likewise the defendants cannot use the pending foreclosure proceedings against the principal debtor as a means of staying the instant proceedings against them.

h

Lastly the guarantee itself contains a conclusive evidence clause in clause 19 which on the authority of *Dobbs v. National Bank of Australasia Ltd.* [1953] 53 CIR 643 seals the defendants' liability under the guarantee.

As the instant application was an appeal by the defendants against an O. 14 judgment, I had accordingly dismissed their appeal with costs.

Also found at [1989] 1 CLJ 190

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